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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1939

No. 28

CITIES SERVICE OIL COMPANY, *Petitioner*

vs.

B. P. DUNLAP, ET AL

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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Brief on Behalf of Petitioner on Submission of Cause

DAVID B. TRAMMELL,
CLAYTON L. ORN,
Fort Worth, Texas,
Attorneys for Petitioner.

A. M. EBRIGHT,
HAYES McCOY,
Bartlesville, Okla.,
H. J. PATTERSON, Austin, Texas,
PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN, Fort Worth, Texas,
Of Counsel.

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FOURTH POINT 56–58

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Northeast corner, which would have included the land in controversy, the pleadings and evidence wholly failing to excuse or explain the delay, such relief being accorded to the holder of the equitable title or an equitable right as against the holder of the legal title, for the reason that the asserted cause of action was barred by the statutes of limitation of Texas and equitable laches.

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OPINIONS OF COURT BELOW

Original opinion rendered by the Fifth Circuit on December 8, 1938, is reported in 100 Fed. (2d) 294, and opinion on rehearing rendered on February 24, 1939, is reported in 101 Fed. (2d) 314.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

1. The jurisdiction of this court is based upon *Judicial Code, Section* 240, *as amended by the Act of February* 13, 1925, 43 *Stats.* 938; (*U. S. C. A. Title* 28, *Sec.* 347), *and Rule* 38, *paragraph* 5, *Subdivision* (*b*) *of this Honorable Court*, the Honorable Circuit

Court of Appeals having failed and refused to apply the decisions of the Supreme Court of Texas concerning the construction of the deed to J. F. Rogers, the lease to W. P. Chandler, the admissibility of evidence to vary the terms of the instruments involved, and the benefits to petitioner as holder of the legal title to the land in controversy of presumptions of good faith, innocence and value paid, thereby rendering an opinion conflicting with and contrary to the decisions of this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64; *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202; *Hudson v. Monnier*, 304 U. S. 397; *Massachusetts v. New York*, 271 U. S. 65; *Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458; *Mason v. U. S.*, 260 U. S. 545; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349; *Hardin v. Jordan*, 140 U. S. 371; *Olcott v. Bynum*, 17 Wall. 44, and *Central Vermont Railway Co. v. White*, 238 U. S. 507, **(in which latter case it was held state decisions placing the burden on plaintiff to prove freedom from contributory negligence created substantive rights)** in the following particulars:

(a) The Honorable Circuit Court, in holding that for grantors to retain title to the road, it was not necessary for their conveyance to expressly reserve title in them since it made no mention of the road, wholly disregarded the applicable Texas cases of *Mitchell v. Bass*, 26 Tex. 372; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Texas Bitulithic Co. v. Warwick* (Tex. Com. App.), 293 S. W. 160; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391; *Amerman v. M. K. & T. Ry.*

Co., 182 S. W. 54, and other cases which hold that where there is a conveyance of land adjacent to or adjoining a roadway, whether public or private, title to the road passes to the grantee by virtue of such conveyance unless there is in the conveyance language expressly rebutting such construction or specifically indicating a contrary intent (there being no such language in the instant deed (R. 105-106), it being immaterial in this connection that the road was never opened or was only used in part or that it was abandoned. *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, *Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54.

(b) The Honorable Circuit Court, in holding that the deed to J. F. Rogers and the oil and gas lease from his heirs to W. P. Chandler, which was owned by petitioner, did not pass title to the road to such grantee, lessee and assignee, held contrary to the case of *Paine v. Consumers Forwarding and Storage Co.* (6 C. C. A. Ohio), 71 Fed. 626, opinion by Judge Taft, and the case of *Roxana Petroleum Corporation v. Sutter* (8 C. C. A. Kan.), 28 Fed. (2d) 159, in each of which cases it was held that the conveyance of a tract of land adjacent to a road or right of way passed title to such road in the absence of a clear intent to the contrary.

(c) The Honorable Circuit Court in overruling petitioner's assignment of error directed to the admission over its objection of the testimony of F. E. Rogers, which was in substance that after the surveyor had measured West 440 yards he advised the

heirs there was a chain left over, and two of the heirs stated they would keep the 66 feet like it was, it then being used for a road, and in giving effect to such testimony by excluding the land in controversy from the deed and lease under which petitioner claimed, wholly disregarded the Texas cases of *Gulf Production Company v. Warren*, 99 S. W. (2d) 616, writ refused, and *Rio Bravo Oil Company v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, and other cases establishing the contrary rule, i. e., title to a road adjacent to a tract conveyed passes to the grantee unless there is language in the conveyance expressly reserving title to the road or specifically indicating a contrary intent, in the absence of which reservation parol testimony is not admissible to show the grantor intended to reserve title to the road.

(d) The Honorable Circuit Court, in holding that petitioner was not entitled to the protection afforded a bona fide purchaser of a legal title against equitable claims and titles because it failed to plead and prove it was a bona fide purchaser of such legal title (the court recognizing petitioner owned the legal title of the land up to the Wiley Davis Northeast corner under applicable Texas cases of *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, and *Swann v. Mills*, 219 S. W. 850), wholly disregarded the applicable Texas cases of *Ritch v. Jarvis*, 64 S. W. (2d) 831; *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109, aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69; *Patty v. Middleton*, 82 Tex. 586, 17 S. W.

909, which hold that in Texas the ownership of the legal title is attended with a presumption of innocence, good faith and value paid, and the burden is on the holder of the equitable title to plead and prove that the holder of the legal title had notice of the equity or was a purchaser mala fide or that a valuable consideration was not paid;[1] the applicable Texas cases of *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied, and *Bailey v. Shell Petroleum Corporation*, 95 S. W. (2d) 982, writ denied,[2] which hold that oil and gas leases reciting a dollar consideration and and containing express and implied obligations to drill offset wells are sufficient considerations; the applicable Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelly v. Jackson*, 6 Pet. 622, 623); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350, and *City of San Saba v. Hudson*, 95 S. W. (2d) 1312), which hold that the recitation of a consideration paid is sufficient proof of consideration when not rebutted; and the applicable Texas cases of *Emde v. Johnson*, 214 S. W. 575, writ denied; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114;

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[1]The Honorable Circuit Court of Appeals for the Fifth Circuit itself has held this to be a rule of property in Texas. (*Turner v. California Co.*, 54 F. (2d) 552, 553.)

[2]Refusal of the writ in these two cases by the Supreme Court of Texas is an approval by such court of the opinion of the Court of Civil Appeals, under the express provisions of Art. 1728, 3 *Vernon's Ann. Civ. Stats.* of 1925, Pamph. Supp.; Acts 1927, 40th Leg., par. 214, ch. 144, sec. 1.

Leath v. Humble Oil & Refining Company, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Pet. Corp.*, 95 S. W. (2d) 982, writ denied (these cases being founded on *Quebe v. Gulf C. & S. F. R. R. Co.*, 98 Tex. 6, 81 S. W. 20), which hold that $1.00 is sufficient consideration for an oil and gas lease such as that held by petitioner.

(e) The Honorable Circuit Court of Appeals, in holding that the recital of $10.00 paid in the lease to Chandler was not evidence of the payment of consideration, also conflicted with the Federal court cases of *New York Life Ins. Co. v. Seifris* (3 C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtiss* (App. D. C.), 259 F. 987; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. (1 C. C. A. Me.), 92 F. 100, and also disregarded a salutary rule of general effect in the United States since the earliest times (*Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360), and many cases cited in Note, where it was said that the lease was supported by a valuable consideration "as it recites the payment of $1.00 down. * * * Look back at hundreds of deeds through hundreds of years and you will find them stating $1.00 as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds." (Ann. Cas. 1912 B, p. 361.)

(f) The Honorable Circuit Court of Appeals decided an important question of local law in a way untenable within the meaning of paragraph 5 of Rule 38 of this Honorable Court in that the effect

of the holding of the Circuit Court is to grant defendants a reformation of a deed executed in 1899 and a lease executed in 1930, in a suit to quiet title by petitioner filed December 18, 1934 (R. 13) and a cross action filed by defendants on January 27, 1936 (R. 43). Under the statutes of limitation of the State of Texas (Art. 5529, 16 Vernon's Rev. Civ. Stats. of 1925) an action to reform a deed must be brought within four years after the cause of action accrued, and the Texas courts hold that grantors in a deed are affected with notice of a mistake in the description upon the recordation thereof. (*J. R. Watkins Co. v. Gibbs*, 66 S. W. (2d) 355; *Central National Bank v. Barclay*, 254 S. W. 140; *Vodrie v. Tyman*, 57 S. W. 680; *Martinez v. Gutierrez's Heirs*, 172 S. W. 766, writ denied; *Calhoun v. Burton*, 64 Tex. 510; *Boren v. Boren*, 85 S. W. 48, writ denied; *Ryman v. Petruka*, 166 S. W. 711. See *Lant v. Manley*, 71 F. 7; *Teall v. Schroder*, 158 U. S. 172.) In this connection also the doctrine of equitable laches applies in Texas to such situation (*Connolly v. Hammond*, 51 Tex. 635; *Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co.* (5 C. C. A. Tex.), 279 F. 977).

STATEMENT OF THE CASE

Petitioner by assignment (R. 172-174) and succession (R. 49-52) was the owner of a producing oil and gas lease[1] made in 1930 by the heirs of J. F. Rogers to W. P. Chandler on a tract of land in Gregg County described therein as follows (R. 138-144):

> Being a part of the G. A. Thomas H. R. Starting at the N. E. cor. of Lot No. 2, which is the NW cor. of W. H. Rogers Tract Lot No. 1 **running West 440 yards to Wily Davis NE. corner;** thence S. 880 yds; thence East 224 yards; thence North 310 yards at 12° East of North; then East 754[2] yards to W. H. Rogers line; thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, Feby. 28, 1899, rec. Vol. 'R', p. 59-60 Deed Records of Gregg County, Texas, save and except 2 acres out of the NW. cor. sold to R. M. Wood, it being the intention to include all land owned or claimed by lessor in said surveys.

Petitioner claimed that its property extended all the way from the Northwest corner of the W. H. Rogers tract on the East to the **Wiley Davis Northeast** corner on the West (excepting a two acre tract sold to R. M. Wood out of the Northwest corner) because

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[1]Which instrument in Texas vests in the lessees a defeasible fee simple title to seven-eighths of the oil, gas and minerals (*Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566; *W. T. Waggoner Est. v. Sigler Oil Co.*, 118 Tex. 509, 19 S. W. (2d) 27).

[2]It was agreed that the figure 754 yards indicated in the abstract should be 154 yards. (R. 106.)

the deeds and leases under which it held title called for these two adjoinders (R. 20-28)[1].

Although petitioner's lease had been of record since November 18, 1930 (R. 138), defendant B. P. Dunlap obtained an oil and gas lease on October 10, 1934, upon a narrow strip of land claimed by petitioner, as a part of its lease, about 66 or 68 feet wide and 880 feet long lying East of and contiguous to the Wiley Davis Northeast corner and East line (less the R. M. Wood 2 acre tract) from the heirs of J. F. Rogers and his three brothers, W. H. Rogers, F. E. Rogers and J. W. Rogers (R. 246-253). The four Rogers brothers, being all of the heirs of Louisa Rogers (R. 61 ¶ 4), owned on February 28, 1899, the East one-half of the Thomason Survey, rated as 320 acres (R. 103-104; 60 ¶ 3; 61 ¶ 5), which included the 68 foot strip in controversy (R. 67 ¶ 14). They, in February, 1899, divided it by assigning to **J. F. Rogers a tract in the Northwest corner, using the same description set out above contained in the oil and gas lease held by petitioner** (R. 105-106); to W. H. Rogers a tract in the Northeast corner (R. 106-107) and to F. E. Rogers and J. W. Rogers the South portion of said East one-half (R. 108-109). The lease they made in 1934 to Dunlap rested on the theory that a strip of land 66 or 68 feet wide along the West side of the 320 acre tract was left undivided in 1899, they claiming in this connection that the call for the **Wiley Davis Northeast** corner was mistakenly and in-

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[1]The rule in Texas is that calls for adjoinder must prevail over calls for distance (*Van Camp v. Gulf Production Co.*, 122 Tex. 383, 405; 61 S. W. (2d) 773, 782; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69).

advertently inserted in the partition deed to J. F. Rogers because they intended to leave the 66 foot strip for a road (R. 31, 34, 35). The Wiley Davis Northeast corner as located on the ground, a well known and established corner (R. 220-223; 201-204; 225-226; 227; 294; 112; 182-184; 189-190; 263; 237-240) was 66 feet further West than the called distance of 440 yards contained in the partition deed to J. F. Rogers and petitioner's oil and gas lease (R. 63) (so recognized by the Circuit Court of Appeals in its opinion (R. 331, middle of page).

Petitioner filed its bill in equity to quiet title and remove the cloud cast on its title by the filing of the Dunlap lease, making Dunlap and all the Rogers and their heirs parties (R. 20-28). Defendants answered, admitting the execution of the partition deed to J. F. Rogers and alleging that when the partition deed was made in 1889 the Rogers' heirs had a surveyor run the North line of the tract and the surveyor stopped at 880 yards West of the Northeast corner of the Thomason Survey and 440 yards West of the Northwest corner of W. H. Rogers tract No. 1; that it was then known that such point was not a common point with the land owned by Wiley Davis, but the surveyor stopped and fixed the corner at 440 yards at the direction of the partitioners (R. 31) purposely so that they could at all times have an outlet to the main public road, leaving a strip on the West side unpartitioned so that they would have such outlet (R. 35); that the call for the Wiley Davis Northeast corner was inserted through inadvertence and mistake (R.

34). They filed cross-actions, alleging that the heirs of J. F. Rogers leased in **good faith** to W. P. Chandler the land described in the lease dated October 20, 1930, but that the lease did not include the 66 foot strip claimed by petitioner and owned by them (R. 37).

Petitioner answered the cross-action alleging that if the Wiley Davis Northeast corner was inserted through mistake, nevertheless the title to the strip passed to petitioner and its predecessor in title, J. F. Rogers, because the called distance of 440 yards extended to the edge of the road (R. 45).

The trial court made findings of fact and conclusions of law (R. 58-72) to which petitioner excepted (R. 73-81), filed request for additional conclusions (R. 81-91) and appealed (R. 299-328). A map interpreting the court's findings of fact is reproduced at the end of this brief.

The District Court concluded as a matter of law that extrinsic evidence was admissible to show that at the time the surveyor made the partition survey in 1899, he placed stakes at the called distances, the stake he placed at the Northwest corner of the J. F. Rogers tract being East of the Wiley Davis corner 66 feet; that extrinsic evidence was admissible to show that one of the stakes had been removed and a gear shaft placed in its stead, and that such parol testimony was admissible, even though the stakes and gear shaft were not called for in any of the instruments in petitioner's chain of title (R. 68 ¶ 16). The trial court found that while the survey was being

made the Rogers heirs informed the surveyor that they would leave the 66 foot strip out of the partition and use the same jointly and keep it like it was; that the 66 foot strip was then being used in part as a logging road (R. 63); that J. F. Rogers never acquired title under the partition deed to the strip of land situated between the Wiley Davis Northeast corner and the called distance of 440 yards in the deed (R. 67 ¶ 14). The title was accordingly quieted in the defendants. **Petitioner was not seeking to develop the road for oil production, although defendants were.**

The questions presented to this court were duly raised in the trial court by exceptions to the testimony, the court's findings and by request for additional findings, and in the briefs and motions for rehearing in the Circuit Court of Appeals.

SPECIFICATIONS OF THE ASSIGNED ERRORS INTENDED TO BE URGED

(1) The Honorable Circuit Court erred in failing to follow the applicable cases of the Texas Supreme Court and the Courts of Civil Appeals which hold that where there is a conveyance of the land adjacent to or adjoining the roadway, whether public or private, title to the road passes to the grantee by virtue of such conveyance unless there is in the conveyance language expressly rebutting such construction or specifically indicating a contrary intent, it being immaterial in this connection that the road was never opened or that it was abandoned. In failing to follow

the rules of property in Texas the court overruled petitioner's assignment of errors I, II and IV (R. 302-305; 305-307).

(2) The Honorable Circuit Court, in overruling petitioner's assignments of errors I, III and IV (R. 302-303; 305-307) directed to the admission over its objection of the testimony of F. E. Rogers which was in substance that after the surveyor had measured West 440 yards he advised the heirs there was a chain left over and two of the heirs stated they would keep the 66 feet like it was, it then being used for a road, and in giving effect to such testimony by excluding the land in controversy from the deed and lease under which petitioner claimed, wholly disregarded the decisions of the Texas Supreme Court and the Courts of Civil Appeals, establishing the contrary rule, i. e. title to a road adjacent to a tract conveyed passes to the grantee unless there is language in the conveyance expressly reserving title to the road or specifically indicating a contrary intent, and in the absence of which, parol testimony is not admissible to show grantor intended to reserve title to the road.

(3) The Honorable Circuit Court erred in holding that the petitioner was not entitled to the protection afforded a bona fide purchaser of a legal title against equitable claims and titles, because it failed to plead and prove it was a bona fide purchaser of such legal title; also in holding the Texas rule that the burden of proof is on the holder of the equitable title to plead and prove that the holder of the legal title is a mala fide purchaser since the ownership of the legal title is

attended with a presumption of innocence, good faith and value paid, was a matter of practice or procedure, not being controlled by *Erie Railroad Company v. Tompkins and Ruhlin v. New York Life Insurance Company.* The decision conflicts with *Central Vermont Ry. Co. v. White,* 238 U. S. 507. In so holding the court overruled petitioner's assignment of errors III, IV, V, VI and XII (R. 302-320)..

(4) The Honorable Circuit Court erred in holding on rehearing that petitioner failed to prove it paid a valuable consideration for the lease, the law in Texas being a recital of $1.00 and the obligations in a lease to drill offset wells is a sufficient consideration, and recitations of a consideration paid is sufficient proof of consideration when not rebutted.

(5) The Honorable Circuit Court erred in affirming the judgment of the trial court which reformed a deed executed in 1899, and a lease executed in 1930 in a suit filed by petitioner in 1934, and a cross-action filed by defendants in 1936, because the action to reform such instruments was barred by the statute of limitation of Texas and equitable laches as defined by the Texas Courts. In affirming the case the court overruled petitioner's assignment of errors III, IV and XI (R. 305-307; 316).

The above errors were assigned in the petition for certiorari and supporting brief filed in this court, and in the Circuit Court in the First and Second Motions for Rehearing (R. 341-363; 370-390) and were raised in the District Court (R. 302-320).

SUMMARY OF ARGUMENT

This case presents important questions as to the extent and applicability of this Honorable Court's recent opinions in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, the Circuit Court having expressly held that under these cases a Federal equity court is not required to follow the law announced by the Supreme Court of Texas that the ownership of the legal title is attended with presumptions of innocence, good faith and value paid, and that the burden is on the holder of the equitable title to plead and prove the holder of the legal title had notice of the equity or was a purchaser mala fide or did not pay a valuable consideration. The Circuit Court further held that these beneficial presumptions were matters of practice or procedure and not matters of substantive law because the presumptions were not created by Texas statutes but by decisions of the Supreme Court. We contend that in order to have uniformity in the relief granted in the state courts and Federal courts, the latter courts sitting in equity, in passing on titles to Texas land are required to grant relief according to rules of equity prescribed by state statutes or recognized by Texas Supreme Court decisions, for a departure from the established Texas rules of equity would introduce confusion, disturbance and uncertainty in Texas land titles. Under Texas decisions constituting rules of property and recognized rules of equity, petitioner was entitled to a decree since it held the legal title and defendants

failed to plead and prove petitioner was a mala fide purchaser and we therefore urge that these decisions constitute the substantive law of Texas. The burden so cast by Texas decisions on the holders of the equitable title are essential parts of their cause of action or defense, just as much as is the burden on the plaintiff in certain states to plead freedom from contributory negligence as a part of his cause of action, and this court, in *Central Vermont Co. v. White*, 238 U. S. 507, held state decisions so casting the burden of pleading and proving contributory negligence were not matters of state procedure but of substantive law. (For discussion see Second Point, pp. 41-51 hereof.)

In construing the partition deed to J. F. Rogers and the oil and gas lease held by petitioner, on questions concerning the amount and location of the land conveyed, the Federal Court should have followed the decisions of the Texas Supreme Court (*Kuhn v. Fairmont Coal Co.*, 215 U. S. 349; *Massachusetts v. New York*, 271 U. S. 65). Likewise it should have followed the decision of the state court on questions involving the admissibility of evidence (*Olcott v. Bynum*, 17 Wall. 44), because the Texas decisions constitute rules of property (*Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458). The fact this is an equitable action does not militate against the rule (*Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202; *Mason v. U. S.*, 260 U. S. 545). (For discussion see First Point, pp. 22-41 hereof.)

Disregarding for the moment the call for the Wiley

Davis Northeast corner, it is certain that in all events the land described in the partition deed to J. F. Rogers would go to and be bounded by the road, which F. E. Rogers, one of the defendants, testified ran along the strip of land in controversy and, under Texas decisions construing such deeds, title of grantors passed to the grantee, it being a rule of property in Texas that title to the roadway under such circumstances passes to the grantee unless expressly reserved in the instrument. (*Mitchell v. Bass*, 26 Tex. 372; *Texas Bitulithic Co. v. Warwick* (Tex. Com. App.), 293 S. W. 160; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, cer. den. 288 U. S. 603; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ ref.; *Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54, writ denied.) **It is immaterial, so far as the title is concerned, that the road was never opened or that it was abandoned or that the travel did not extend from one fence to another.** (*Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54, writ denied; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448.)

The same rule has been announced by two Circuit Courts of Appeal of the United States. (*Paine v. Consumer's Forwarding & Storage Co.* (6 C. C. A. Ohio), 71 F. 626; *Roxana Pet. Corp. v. Sutter* (8 C. C. A. Kan.), 28 F. (2d) 159.

The rule is applicable to alleys and private ways (*Weiss v. Goodhue*, 102 S. W. 793, writ ref.; *Guadalupe County v. Poth*, 163 S. W. 1050; *Pecos & N. T. Ry. Co. v. Falls*, 96 S. W. (2d) 430; *Paine v. Con-*

sumer's Forwarding & Storage Co. (6 C. C. A. Ohio), 71 F. 626), **and to partition deeds, and oil and gas leases, as well as other conveyances** (*Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54, writ ref.; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448).

The partition deed to J. F. Rogers having called for the Wiley Davis Northeast corner, the location of which was well known to the Rogers heirs (being at the extreme Northwest corner of the property they were partitioning), evidenced an intention on their part to pass title to the road, subject to the easement to J. F. Rogers, and their failure to expressly reserve title in themselves made the presumption conclusive. The inclusion in the oil and gas lease by the heirs of J. F. Rogers to W. P. Chandler, which petitioner acquired by assignment, the general clause **"it being the intention to include all land owned or claimed by lessor in said surveys"** certainly evidenced an intention on their part to divest them of their title to all land they owned in the survey.

The presumption being conclusive, parol testimony therefore was not admissible to show that the heirs intended to leave unpartitioned the 66 foot strip being used as a road (petitioner not admitting that the parol testimony introduced did show they intended to leave the strip unpartitioned) and parol testimony was not admissible to show the surveyor set stakes short of the called distance because such objects were not mentioned in any of the instruments in petitioner's chain of title. (*Gulf Production Co.*

v. Warren, 99 S. W. (2d) 616, writ ref.; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080.) (For discussion see First Point, pp. 22-41 hereof.)

The partition deed to J. F. Rogers vested him with the legal title to all land lying between the Northwest corner of Tract No. 1, partitioned to W. H. Rogers and the Northeast corner of the Wiley Davis Tract because the two adjoinders were called for in his deed and their locations were known to the surveyor and the Rogers heirs. (*Garrison v. Crowell*, 67 Tex. 626; 4 S. W. 69; *Swann v. Mills*, 219 S. W. 850; *Miller v. Southland Insurance Co.*, 68 S. W. (2d) 558.) If the grantors conveyed more land than they intended they had only an equitable right to reform the deed which they executed in 1899, and having failed to assert such equitable right of reformation for more than thirty years until petitioner acquired the legal title to the oil and gas leasehold estate based on the partition deed of record, they could not defeat the legal title without pleading and proving petitioner was a mala fide purchaser, for the rule in Texas, well established by the decisions of the Supreme Court, is that the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, the burden resting on the holder of the equitable title to show to the contrary. (*Ritch v. Jarvis*, 64 S. W. (2d) 831; *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109, aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *White v. Hicks*, 104 S. W. (2d) 136; *Love v. Allday*, 106 S. W. (2d) 830, writ dismissed; *Kenedy v. State*, 196 S. W. 287; affirmed,

111 Tex. 200, 231 S. W. 683, cer. den. 258 U. S. 617; *Davidson v. Renfro*, 114 S. W. 449), **this being the rule in Texas even where the action is brought by the legal title holder.** (*Catrett v. Brown Hardware Co.*, 86 S. W. 1045; *Brown Hardware Co. v. Catrett*, 101 S. W. 559, writ dismissed; *Middleton v. Johnson*, 110 S. W. 789; *Ratcliffe v. Mahres*, 122 S. W. (2d) 718.) (For discussion see Second Point, pp. 41-51 hereof.)

The burden was not on petitioner to prove it paid a valuable consideration for the oil and gas lease, but if it was it discharged this burden because of the recitals contained in the oil and gas lease and the assignment to petitioner of a consideration paid and the express and implied obligations to drill offset wells. (*Jones v. Bevier*, 59 S. W. (2d) 945, writ den.; *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ den.) **The recitation of $10.00 paid in the W. P. Chandler lease was itself sufficient.** (*Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ den.; *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312; *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523 (cited in *Moss-Tate Inv. v. Owens, supra*), **and the recital of $1.00 paid is in Texas sufficient consideration to support an oil and gas lease.** (*Emde v. Johnson*, 214 S. W. 575, writ den.; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ den.; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil*

& Refining Co., 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ den.; *Bailey v. Shell Pet. Corp.*, 95 S. W. (2d) 982, writ den.; *Quebe v. Gulf C. & S. F. RR. Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545.

Federal Courts hold that the receipt of money in an instrument is prima facie evidence of payment of consideration. (*New York Life Ins. Co. v. Seifris* (3 C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtiss* (App. D. C.), 259 F. 987; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. (1 C. C. A. Md.) 92 F. 100, and this seems to be the better rule supported by the weight of authority. (*Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707; Ann. Cas. 1912B, 360 and note. (For discussion see Third Point, pp. 51-56 hereof.)

The Honorable Circuit Court, in affirming the judgment, in effect granted a reformation of a deed executed in 1899, recorded in 1900, and an oil and gas lease executed and recorded more than four years prior to the filing of the suit, by eliminating from the description of the property conveyed the call for the Wiley Davis Northeast corner, which would have included the land in controversy, on pleadings and evidence wholly failing to excuse or explain the delay, such relief being accorded to defendants claiming an equitable title or right as against the holder of the legal title, even though defendants' asserted cause of action was bared by the four year statute of limitations of Texas (Article 5529, 16 *Vernon's Rev. Civ. Stats.* 1925), and the doctrine of equitable laches (*Connolly v. Hammond*, 51 Tex. 635; *Empire*

Gas & Fuel Co. v. Higgins Oil & Fuel Co. (5 C. C. A. Tex.), 279 F. 977. (For discussion see Fourth Point, pp. 56-58 hereof.)

ARGUMENT

FIRST POINT

Disregarding for the moment the call for the Wiley Davis Northeast corner, and construing the deed according to Texas decisions, title to the road passed to J. F. Rogers and petitioner subject to the easement, because the land described went to and was bounded by the road, and the deed and lease did not expressly reserve title in grantors and lessors. Parol evidence was not admissible to show the grantors intended to reserve title to the road, or set stakes not called for in their deeds. The Texas decisions create rules of property to be followed by Federal Courts.

The Honorable Circuit Court in its opinion stated:

> "The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common for the purpose of a road." (R. 334-335.)

This being true, the called distance of 440 yards extended to the edge of the strip of land the heirs set aside for a road, and title to the road passed to J. F. Rogers because the partition deed contained no express reservation of the road in grantors. **An unexpressed intention to reserve title is not sufficient; the reservation must be in the deed.** The Circuit Court, after holding that under settled rules of law a conveyance of land adjoining a road will carry the grantor's title to the servient fee of the road because of the presumption based on public policy that parties would not reserve a long narrow strip for which they had no use, then erred in holding that "if the intention to do so is clear (meaning reserve title to the road) the contrary presumption must yield," for the court failed to limit the exception to the rule to **"an intention expressed in the instrument."**

The court likewise erred in holding "There is a plainly **expressed** intention not to add the strip to Lot No. 2 but to retain joint control and ownership. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a **reservation** of the land * * *." If there was no occasion to make a reservation of the land in the deed to J. F. Rogers (and none was made, see deed (R. 105), then there was no "expressed intention" in the deed not to add the strip to Lot No. 2.

A purchaser from the heirs of J. F. Rogers and their lessees, such as was petitioner, could not glean from the partition deed and the oil and gas lease subsequently acquired by petitioner, that the four Rogers

heirs intended to reserve title to the road, particularly in light of the fact that each of these instruments contained a call for the Wiley Davis Northeast corner, which in itself would have included the road, and the called distance of 440 yards extended to the edge of the large public road in use when the lease was executed, and no mention was made in the instrument of a reservation of title to the road. Any intention on the part of the Rogers heirs to reserve title to the road must be gathered from the conversation they had in 1899 when the survey was being made and not from the deed.

Authorities holding title to road passes unless expressly reserved in the deed.

One of the earliest Texas cases is that of *Mitchell v. Bass* (1862), 26 Tex. 372, wherein the court said:

> "The established doctrine of the common law is, that a conveyance of land bounded on a public highway, carries with it the fee to the center of the road, as part and parcel of the grant. **Such is the legal construction of the grant, unless the inference that it was so intended, is rebutted by the express terms of the grant.** The owners of the land on each side, go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Upon the discontinuance of the highway, the soil and freehold revert to the owner of the land." (p. 380.)

The *Bass* case was cited and followed in *Texas Bitulithic Co. et al v. Warwick*, 293 S. W. 160, where

the Supreme Court Commission of Appeals of Texas construed a deed to city lots bounded by a street, calling for a distance that extended to the inner edge of the street and for stakes that had been set along the inner edge of the street, as conveying title to one-half of the street because not expressly reserved, and the following was said in the opinion:

"'The presumption of an intent to convey title to the center of a street or highway is not overcome by the fact the land is described by metes and bounds, and that the distances stated in the description of the deed do not extend to the center of the street.' We think the weight of the better reasoned authorities in other jurisdictions is contrary to the decision of that Court of Civil Appeals herein. We are of the view that the correct rule was referred to by Chief Justice Wheeler in the Bass case, supra, when he said that title extends to the center of the street unless the express terms of the grant show a contrary intention. A very thoroughly considered case upon this point is that of Bowers v. Railway Co. by the Supreme Court of Kansas reported in 119 Kan. 202, 237, p. 913, 42 A. L. R. 229. In that case the court said:

"'This court has approved the doctrine that to exclude half of the highway from a conveyance the grantor must make his purpose to exclude clear by **express declaration,** or equivalent of express declaration, **in the instrument.**' In the case of Tousley v. Galena M. & S. Co., 24 Kan. 328, the opinion was written by Justice Brewer, later of the United States Supreme Court. In the Galena case he held that, unless the road or street be expressly excluded, the

grantee takes to the center thereof." (pp. 162-163.) * * *

"We quote as follows from the case of Marsh v. Burt, 34 Vt. 289:

" 'Parties have the right to make their conveyances as they choose, and when the intention to exclude the highway is clear, explicit and unequivocal, it is the duty of the court to carry out their intention, but **when the language is such that by a fair construction the intent is doubtful, it is the duty of the court to resolve that doubt so as to give to the deed the effect of conveying the land to the center of the highway.'** (p. 163.)" * * *

"Therefore we think the courts are exactly right when they say that a deed does carry the property to the center of the adjoining street unless such deed contains a clause which **expressly declares the contrary intention** or contains some other declaration equivalent to such an express declaration. **In other words, we think that the purchaser of a lot should be put definitely upon notice that he has no rights in the sidewalk and street in front of his property, if that is the intention of the grantor.** * * *." (p. 164.)

The *Warwick* case was cited and followed in *Rio Bravo Oil Company et al v. J. F. Weed, et al*, 121 Tex. 427, 50 S. W. (2d) 1080, cer. den. 288 U. S. 602, when the court applied the same principle of law to a railroad right of way. In the *Weed* case the facts revealed the heirs partitioned a 52 acre tract into eight lots, and a plat of the subdivision showed the boundaries of the lots, the acreage of each and their location with reference to the right of way. The

heirs executed partition deeds describing the tracts by lot numbers. In holding the title to the right of way passed because the lots adjoined it, the court said:

> "In other words, when a person conveys a piece of property abutting upon a public highway or nonnavigable stream it is but natural to assume, **in the absence of an express reservation to the contrary,** that he intends to convey the same with all of the beneficial rights enjoyed by him in its use. Such benefits and advantages are usually of compelling force in inducing the sale of the property." (50 S. W. (2d) 1084.)

The Weed case was cited and followed the opinion in *Roxana Petroleum Corporation v. Sutter, et al* (8 C. C. A. Kan.), 28 Fed. (2d) 159, the court holding that the servient estate passes "**'unless the intention not to do so be clearly indicated,'**" and saying:

> "'Defendant says Baldwin's deed disclosed no intention to convey half of the highway. This is not the interpretative test. The test is whether the deed **expressed** intention to exclude half the highway from the grant'." (28 F. (2d) 162.)

In *Shell Petroleum Corporation et al v. Hollow* (10 C. C. A. Kan.), 70 Fed. (2d) 811, the court said:

> "The servient estate passes with such a conveyance, even though no express provision to that effect is contained in the instrument. The rule is that such estate passes unless it is excluded by **clear, unequivocal and unmistakable language.**" (p. 814.)

In *Roxana Petroleum Corporation v. Corn* (8 C. C. A. Kan.), 28 F. (2d) 168, the court in holding the attempted reservation of title to the railroad right of way was insufficient said:

> "'Did the exception in the oil and gas lease clearly indicate an intention to except therefrom the oil and gas in the tract of land in and across which Buffington had theretofore conveyed a right of way to the railroad company?" (p. 170.)

Texas decisions could be multiplied holding that the servient estate in roads, railway rights of way, etc., pass with a conveyance of the fee to the abutting tract of which the strip formerly was a part, unless there is an **express reservation** in the deed, some of which cases are *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Bolton v. Dyck Oil Company*, 114 S. W. (2d) 299; *Weiss v. Goodhue*, 102 S. W. 793 (writ refused); *Gulf Sulphur Company v. Wyman*, 221 S. W. 310; *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616 (writ refused); *Guadalupe County v. Poth*, 163 S. W. 1050; *Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54 (writ refused).

Since the road was entirely laid out on land belonging to the four Rogers heirs the title to the entire strip passed to J. F. Rogers. (9 *C. J.*, sec. 97, p. 203; 4 *R. C. L.*, sec. 8, p. 79; 2nd Ed. *Devlin on Deeds*, p. 312; *Gulf Sulphur Co. v. Wyman*, 221 S. W. 310, 312; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, 450.)

The same principle is applicable to alleys and private ways (*Weiss et al v. Goodhue*, 102 S. W. 793

(writ refused); *Guadalupe County et al v. Poth et al*, 163 S. W. 1050; *Pecos & N. T. Ry. Co. et al v. Falls*, 96 S. W. (2d) 430; *Paine et al v. Consumers, Forwarding & Storage Co. et al* (6 C. C. A. Ohio), 71 Fed. 626; 58 A. L. R. 238; 9 *C. J.*, sec. 107, pg. 205), **and applies to partition deeds** (*Amerman et al v. M. K. & T. Ry. Co.*, 182 S. W. 54 (writ refused); *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448), **and the oil and gas leases** (*Rio Bravo Oil Co. v. Weed, supra; Cantley v. Gulf Production Co., supra; Bolton v. Dyck Oil Co.*, 114 S. W. (2d) 299 (writ dismissed); *Gulf Production Co. v. Warren*, 99 S. W. (2d) 617 (writ refused); *Roxana Petroleum Corp. v. Sutter* (8 C. C. A. Kan.), 28 Fed. (2d) 159), and the owner of an oil and gas lease on such servient estate can maintain an action in trespass to try title or remove cloud. (*Gulf Sulphur Co. v. Wyman*, 221 S. W. 310.)

The intention of grantors as expressed in instruments in chain of title.

The court in arriving at the intention of the Rogers heirs should not only have considered the call for the Wiley Davis Northeast corner, but it should have given much weight to the well settled rule of property in Texas that there is a presumption that parties partitioning land intend to divide all of it, and not retain small narrow strips. (*Gulf Production Co. v. Baton*, 108 S. W. (2d) 960 (writ refused); *Beck v. Gulf*, 113 S. W. (2d) 258.) **Experi-**

ence has led the courts in Texas to resolve all presumptions against the retention of small strips and gores. (*Livingston Oil & Gas Co. v. Shasta Oil Company*, 114 S. W. (2d) 378 (writ dismissed).

Another fact evidencing the intention on the part of the Rogers heirs to partition all the land was the fact that the patent from the State of Texas called for the North line of the Thomason Survey to be only 1760 yards (1900.8 vrs., being one mile) (R. 96-97), and the deeds to the East one-half, including the one to Louisa Rogers, called for the North line thereof to be only 880 yards (950 vrs. being 880 yards) (R. 102-104) and the partition deeds to the North two tracts called for their combined distance to be 880 yards. These instruments being in the petitioner's chain of title showed that the parties had always treated the East one-half as being 880 yards wide, even though on the ground it was excessive because the patented survey included more land than the called distance under the rule in Texas that marked objects control distances.

As a matter of fact the heirs of J. F. Rogers in their lease to W. P. Chandler (petitioner's lease) expressly declared "*it being the intention to include all land owned or claimed by lessor in said surveys*" (R. 139).

Parol testimony of F. E. Rogers, if admissible, did not show intent to reserve title to road.

Based on the parol testimony of F. E. Rogers, admitted over petitioner's objection, the court held that e Rogers heirs intended to leave unpartitioned the ad and concluded that title remained at all times in em. Mr. Rogers testified that when the survey was ing made, after the surveyor had told the heirs ere was a chain left the heirs said "We will just ep that like it is. We were using that for a road at at time of the year." (R. 222.) This meant no more an they would let the 66 foot strip remain as a road. certainly was not sufficient to show a clear intent retaining title in themselves to the strip. (*Cantley, Gulf Production Company*, 118 S. W. (2d) 448; *eiss v. Goodhue*, 102 S. W. 793 (writ refused); *ell Petroleum v. Hollow* (10 C. C. A. Kan.), 70 F. d) 811; *Roxana Petroleum Corp. v. Sutter* (8 C. C. Kan.), 28 Fed. (2d) 159; *Roxana Petroleum Corp. Corn*, 28 F. (2d) 168.

In *Bolton v. Dyck Oil Company*, 114 S. W. (2d) 9 (writ dismissed), the court said:

"'A grant of land by metes and bounds with full covenants of warranty, excepting or reserving a roadway for the use of the public, or a right of way, for a railroad, passes the fee to the land subject to the easement reserved.' In Wellman v. Churchill, 92 Me. 193, 42 A. 352, it was held that the reservation or exception of 'a way' reserved only an easement, not the soil or fee. In Wellman v. Dickey, 78 Me. 29, 2 A. 133, a deed containing the words 'excepting the roads

laid out over said land' was held to convey the fee within the limits of the road, subject to the easement of the public incident to the use of the road. See, also, Roxana Petroleum Corp v. Corn, 8 Cir. 28 F. (2d) 168; Shell Petroleum Corp. v. Corn, 10 Cir. 54 F. (2d) 766, and Martin v. Southern Pine Lbr. Co., 284 S. W. 918. *-* *" (p. 301.)

Failure to mention road in conveyance does not militate against conclusive presumption.

The Circuit Court in holding that J. F. Rogers did not acquire title to the road under the partition deed, said: "Since the deed as prepared said nothing about a road as a boundary there was no occasion to make a reservation of the land." None of the many Texas cases cited above hold that a road remains with grantors if not called for in the deed, but on the other hand hold title passes if the called distance extends to the edge and the road is not expressly reserved in the deed.

In *Magnolia Petroleum Co. v. Caswell*, 295 S. W. 653, reversed on other grounds, 1 S. W. (2d) 597, the Court of Civil Appeals, quoting with approval the rule as announced in *Corpus Juris*, said:

"It is also said that failure to mention street or hightway does not prevent the above rules operating. It is thus said in 9 C. J. 199, sec. 89: 'The general rule that the grantee of land bounded by a street or highway takes to the center thereof is not affected by the fact that the land is not described in the deed as bounded on the highway, provided it is actually so bounded. The

presumption that it was not the intention of the grantor to withhold his interest in a street or highway to the middle of it, after having parted with all his right to the adjoining land, is just as strong as if the conveyance had expressly mentioned the street or the highway as a boundary." (295 S. W. 659.)

Many cases from other jurisdictions hold contrary to the rule announced by the Honorable Circuit Court of Appeals, some of which are as follows: 9 *C. J.* 199, sec. 89; 11 *C. J. S.* 581, sec. 35A; 7 *Tex. Jur.* 131, sec. 11; *Annotation* 2 *A. L. R.* 6, 31, sec. Vg; 47 A. L. R. 1276, Vg; *Annotation* 17 L. Ed. 818; *Thompson on Real Property*, sec. 3202, Note 60; *Magnolia Petroleum Co. v. Caswell* (Tex. Civ. App.), 295 S. W. 653, 659, reversed on other grounds, 1 S. W. (2d) 597; *Roxana Petroleum Co. v. Sutter*, 28 Fed. (2d) 159; *Merchant v. Grant*, 26 Cal. App. 584, 147 Pac. 484; *Florida Southern Ry. Co. v. Brown*, 23 Fla. 104, 1 So. 512; *Bowers v. Atkinson, T. & S. F. Ry. Co.*, 119 Kan. 202, 42 A. L. R. 228, 237 Pac. 913; *City of Springfield v. Eisenmeyer*, Mo. Ct. App. 297 S. W. 460; *Grant v. Moon*, 128 Mo. 43, 30 S. W. 328; *Van Winkle v. Van Winkle*, 184 N. Y. 193, 77 N. E. 33; *Cross v. Talbot*, 121 Ore. 270, 254 Pac. 827; *Durbin v. Roanoke Bldg. Co.*, 107 Va. 753, 60 S. E. 86; *Norcross v. Griffith*, 65 Wis. 599, 27 N. W. 606, 56 Amer. Rep. 42; *Wegge v. Madler*, 129 Wisc. 412, 109 N. W. 223, 116 Amer. St. Rep. 953.

The rule is well stated in *Cross v. Talbot*, 121 Ore. 270, 254 Pac. 827, wherein the court said:

> **"We are of the opinion, and we take it that the weight of authority is to the effect that, where the land described by metes and bounds actually abuts upon the highway, the grantee, in the absence of some clear intention on the part of the grantor to otherwise limit the description, will take to the center of the highway to the same extent that he would had the highway been actually mentioned as a boundary." (254 Pac. 828.)**

In *Van Winkle v. Van Winkle* (New York Appeals 1906), 77 N. E. 33, the court said:

> **"Where a deed gives the boundaries of the land conveyed by courses and distances, without mentioning a street by which the same is bounded on one side, but where it appears that the distance given does, in fact, carry the boundary to the street and along it, it is the same as though the boundary were described as running to the street and along the same, thus extending the title to the center." (77 N. E. pp. 35-36.)**

The Circuit Court of Appeals has cited no authority supporting its holding on this question. At the conclusion of the paragraph dealing with the road it cited 11 *C. J. S.* "*Boundaries*," sec. 35 (4). We have examined carefully this citation and we fail to find support in the court's opinion. On the other hand the text announces a contrary rule (11 *C. J. S.* "*Boundaries*," sec. 35A, page 581, citing among other cases *Cross v. Talbot*, quoted from above, stating that the general rule is the title passes even though "the land

is not described in the conveyance as bounded on the highway."

It is immaterial that the travel was not over the entire 66 feet.

Even though all of the 66 foot strip was not being used as a road at the time of the partition, it was set aside for road purposes for the benefit of the heirs and their grantees and therefore title passed. Defendants plead that at the time the partition was made the 66 foot strip was being used as a logging road and the heirs purposely left the strip unpartitioned so that at all times they would have an open outlet. (R. 34-35 ¶ 10-11.) F. E. Rogers, one of the heirs who accompanied the surveyor, testified they were using the 66 foot strip for a road at that time of the year, they having a sawmill on their land (R. 222). He testified:

"Since the division between the heirs and the establishment of the 440 yard corner at the North and the establishment at the corner where the gear wheel is located, **a road has been open for the use of anyone who wanted to travel it.** To my own knowledge, J. E. Rogers, Mrs. Waskom and Mrs. L. J. Rogers never claimed that road as against the children of Alexander Rogers. Up until the time the Empire filed this suit I had never known of anyone claiming this road as against us." (R. 223-224.) * * *

"I have lived all my life not very far from the tract. I knew it was cleared out. **I expect the road was fifty or sixty feet wide between Dink's**

West fence and Davis fence in the old days." (R. 227.)

The road was an ordinary country one, the travelling public having meandered back and forth between the trees in such a way as to avoid the washes caused from heavy rains (R. 244-246). When petitioner acquired its oil and gas leases the fences were at least 60 to 70 feet apart although the road did not take up all of this area.[1] The character of the road from the time of the partition until long after the discovery of the East Texas Oil Field was described by F. E. Rogers (R. 222-224, 226-227); in fact he testified that since the partition and establishment of the corner where the gear shaft was located **"the road has been opened for the use of anyone who wanted to travel it** (R. bottom 223, top 224), and that up until the time petitioner filed the suit he had never known of anyone claiming the road against the heirs (R. top 224).

The road was further described by witnesses (Simmons (R. 244-246)[2]; Sport (R. 239-241)[3]; York (R.

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[1]Bearing in mind the Texas rule announced in *Texas Bitulithic Co. v. Warwick*, 293 S. W. 180, **"that the purchaser of a lot should be put definitely upon notice that he has no rights in the sidewalk and street of his property, if that is the intention of the grantor,"** there was nothing in the partition deed to put petitioner on such notice, and the strip was being used for road when it acquired its lease. Applying equitable principles petitioner should not suffer for defendants' mistakes.

[2]**"The roads meander back and forth in between those trees and at the exact spot I do not know whether there is any road or not. The road would wash on one side and then they would get on the other side."** (R. 246.) **"The road is traveled one place one time and another place another time."** (R. 244.)

[3]**"The fences must have been at least sixty or seventy feet apart but**

195-196); Baker (R. 123, 125, 135)*; and Leuty (R. 152-153).

We do not contend that since 1899 each and every square foot of the 66 foot strip has been travelled over daily. Even though at times of the year the travel was confined to the furtherest edge of the road, does not mean the strip was not a road. As defined by Webster's New International Dictionary, a road is a place where one may ride and we believe a road includes the footpaths, drainage ditches and all other portions of the area set aside for public or private use.

The Texas rule is stated in 39 *Tex. Jur.* "*Streets*," sec. 6, page 515, as follows:

> "Nor is it essential that the public use the entire width of a dedicated street in order to preserve its rights to the same; and the fact that the street is not graded or worked or used for travel to its full width as dedicated does not affect the right of the public to use its entire width as dedicated or the effect or extent of the dedication and acceptance." (39 *Tex. Jur.*, p. 515, sec. 6.)

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the road did not take up all the land, however. The road was cut out twenty-five, thirty or forty feet wide. It did not go plumb straight when it was originally cut out. Davis' fence was back ten, fifteen or twenty feet from the West line of the road. * * * Wiley Davis had a fence on the West side of the road running clear up to the school house lot. I do not think, in 1930, before the road was widened, Davis and Rogers' fences were within forty-five feet of each other. I did not measure them. I was road overseer and people went over the road. In my judgment they were sixty or seventy feet apart. After the fences were put there the road was widneed." (R. 239-240.) * * * "It was almost in the road. The road wobbled quite a little bit." (R. 241.)

*"When I was there the road was about 60 feet wide and it was a well graveled and muchly traveled road at that time." (R. 123.)

In *Bruner Fire Co. v. Payne*, 118 S. W. 602, the Texas Court of Civil Appeals said:

> **"The effect of appellant's contention is that, to preserve its rights to a highway, the public must use for purposes of travel every foot of it. This is not the law."** (p. 605.)

The Texas courts have said that the title passes, it being immaterial that the road was never opened or that it was abandoned. (*Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54; *Texas Pacific Railway Co. v. Chandler*, 20 S. W. (2d) 380; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, 450; *Temple v. Sanborn*, 91 S. W. 1095.

In *Emerson v. Bedford*, 51 S. W. 889 (writ refused), the court said:

> **"It seems, however, that these streets were never opened and used or otherwise accepted by the public; but that did not affect the rights of the subsequent grantees of the blocks, taking conveyances with reference to the streets."** (p. 890.)

In *Loud v. Brooks*, 241 Mich. 452, 217 N. W. 34, the court reviewed numerous cases where the facts showed the road had not been opened or abandoned and stated that their research had discovered only two cases holding title did not pass if the road was not opened, one being a New Jersey case and the other a Maine case. It cited many cases holding the contrary rule and held that the better rule was that a conveyance of land bounded by a highway, street or

alley, carried with it the fee to the center thereof, subject to the easement, provided there were no words in the deed showing a contrary intent whether the dedication of the highway, street or alley had been accepted or not or had been opened or not.

In *Paine v. Consumers Forwarding & Storage Co.* (6 C. C. A. Ohio), 71 Fed. 626, Justice Taft said:

> "First, it is said that the principle is never applied except when there is an actual public highway forming a visible monument. The case of Hopkinson v. McKnight, 31 N. J. Law 427, is relied upon to sustain this proposition. The weight of authority is, however, decidedly to the contrary. In the case of Stark and Wales v. Coffin, 105 Mass. 328, it was held that a deed conveying part of a tract of land as bounded 'by a passageway of fifteen feet wide,' leading across the tract, with no restriction or controlling words, passes the fee to the center of the way so assumed as a monument, although no such way existed at the date of the deed, or has ever been fenced off, and although the deed provided that the passageway was to be held in common forever by the parties to the deed." (p. 630.)

Parol evidence in derogation of partition deed was inadmissible.

The trial court erred in concluding as a matter of law extrinsic evidence was admissible to show the surveyor stopped at 440 yards West of the Northeast corner of Tract No. 2 and set a stake, leaving the strip out of the partition for a road (R. 70-71). In the absence of an express reservation title to the road

passed to J. F. Rogers, his heirs and their lessees and assigns, and parol evidence was not admissible to show the parties intended otherwise (*Rio Bravo Oil Co. v. J. F. Weed, et al*, 121 Tex. 427, 50 S. W. (2d) 1080, cer. den. 288 U. S. 603; *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ refused).

In *Gulf v. Warren, supra*, the controversy involved the inclusion or non-inclusion of a railroad right of way in the description of an oil and gas lease, which was bounded by the right of way, and the lessors sought to show they went upon the ground and specifically pointed out the tracts to be covered by the lease, which designation did not include the railroad right of way. The court held that such testimony was not admissible and if received was without probative force in the construction of the lease (99 S. W. (2d) 626) and cited and relied upon *Rio Bravo Oil Company v. Weed*, supra, by the Supreme Court of Texas.

Rules of evidence in suits in Federal courts involving Texas land are controlled by Texas decisions (*Olcott v. Bynum*, 17 Wall. 44).

The trial court found that the stakes testified about by F. E. Rogers, as well as the old gear shaft, were not mentioned in any of the instruments in petitioner's chain of title (R. 68 ¶ 16). Petitioner should not be bound by the location of objects not called for in its chain of title, particularly when the location of these objects are in direct conflict and repugnant to the call for an adjoinder, i. e. Wiley Davis Northeast corner. The court so held in *Anderson v. Stamps*, 19

Tex. 460, saying "That would be to contradict by parol the most material call of his grant."

Federal Courts follow state courts on construction of deed, and rules of evidence.

In construing the partition deed to J. F. Rogers and the oil and gas lease held by petitioner on questions concerning the amount and location of the land conveyed, the Federal Court should have followed the decisions of the Texas Supreme Court (*Kuhn v. Fairmont Coal Co.*, 215 U. S. 349; *Massachusetts v. New York*, 271 U. S. 65). **Likewise it should have followed the decision of the state court on questions involving the admissibility of evidence** (*Olcott v. Bynum*, 17 Wall. 44), **because the Texas decisions constitute rules of property** (*Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458). **The fact this is an equitable action does not militate against the rule** (*Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202; *Mason v. U. S.*, 260 U. S. 545).

SECOND POINT

The court erred in holding Erie Railroad Company v. Tompkins and cases following it did not require a Federal equity court in passing on Texas land titles to follow decisions of the Supreme Court of the state holding that the ownership of the legal title is attended with presumptions of innocence, good faith and value paid, and the burden is on the holder of the equitable title to both plead and prove the holder of the legal title was a mala fide purchaser, and in as-

signing as a reason for refusing to follow the Texas decisions that they were matters of practice or procedure, and the rights accruing to the legal title holder were not created by statute but by court decisions.

Defendants realizing that the call for the Wiley Davis corner would include the road, plead it was inserted through mistake (R. 31) and the trial court reformed the partition deed and oil and gas lease held by petitioner by deleting the Davis adjoining call (R. 52-56). Defendants did not plead and prove petitioner had notice of such mistake, that it did not purchase from a bona fide purchaser, and that it did not pay a valuable consideration.

As we understand the court's opinion, it entertained no doubt but that the adjoining call vested petitioner with the legal title to the strip; however, it thought and held defendants were entitled to a reformation of the partition deed and oil and gas lease on account of their mistake and the failure of petitioner to plead and prove it was a bona fide purchaser of the legal title.

The Honorable Circuit Court thought that under such decisions as *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69; *Swann v. Mills*, 219 S. W. 850 (writ dismissed), and *Miller v. Southland Insurance Company*, 68 S. W. (2d) 558, cited in our brief, petitioner held the legal title to the strip.

In *Swann v. Mills, supra,* the deed called for adjoinders but the surveyor stopped at the called distances, short of the adjoinders and marked a line not called for in the deed, and the court held legal title of the land to the adjoinder passed, saying:

> **"Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed." (p. 852.)**

One of the earliest cases of Texas announcing the rule that the legal title of a strip passed on account of the adjoining call is *Garrison v. Crowell,* 67 Tex. 626, 4 S. W. 69, in which case the deeds in the chain of title called for an adjoinder but the surveyor stopped at the called distance, which was 79 varas short of the adjoinder and hacked a line at the called distance (however, the deeds did not call for the hacked line just as the partition deed in the case at bar did not call for the stakes and gear wheel); the original grantor sought to recover the 79 vara strip against a subsequent grantee who bought on the strength of the call for adjoinder, and he was denied any relief because he failed to show the subsequent grantee knew of the mistaken call for the adjoinder.

In *Miller v. Southland Insurance Company,* 68 S.

W. (2d) 558, following and citing *Garrison v. Crowell*, a recovery was denied those asserting an equitable title against the bona fide purchaser of the legal title where their claims were based on their testimony that the calls for the adjoinder were inserted through mistake and the surveyor stopped at the called distance and set objects not called for in the deed.

Texas rule of presumptions attended with purchase of legal title.

On motion for rehearing the Circuit Court stated that although the Texas rule was exceptional and the minority, nevertheless the decisions of the Texas Courts were well settled that on an issue of bona fide purchaser for value without notice, the burden of proof is upon him who attacks the legal title and asserts the equity, citing *White v. Hicks*, 104 S. W. (2d) 136.

In *R. B. Godley Lumber Co. v. Teagarden*, 135 S. W. 1109 (aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973), it was said;

> "* * * It is clear that, as against an equity or equitable estate, the holder of the legal title is presumed to be a holder in good faith. The well-established rule is that one who seeks to establish an equity or equitable interest as against the holder of the legal title has the burden of proving notice of his equity to the holder of the legal title at the time of his purchase." (135 S. W. 1114.)

In the Supreme Court the same rule was said in this language:

> "The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company." (105 Tex. 620.)

Texas cases can be multiplied announcing the same rule, some of which are: *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *Love v. Allday*, 106 S. W. (2d) 830, writ dismissed; *Kenedy v. State*, 196 S. W. 287, affirmed 111 Tex. 200, 231 S. W. 683, cer. den. 258 U. S. 617; *Davidson v. Renfro*, 114 S. W. 449.

Thus, in Texas, if the plaintiff as the legal title holder, sues the defendant as the equitable title holder, plaintiff is entitled to a judgment on the pleadings or, at the conclusion of the evidence, unless defendants have not only plead and proved their equitable title but have also plead and proved plaintiff was not a bona fide purchaser. (*Catrett v. Brown Hardware Co.*, 86 S. W. 1045; *Brown Hardware Co. v. Catrett*, 101 S. W. 559, writ dismissed; *Middleton v. Johnson*, 110 S. W. 789; *Ratcliffe v. Mahres*, 122 S. W. (2d) 718.)

In *Brown Hardware Co. v. Catrett*, supra, the court said:

> **"Plaintiff having purchased the legal title, the burden was upon defendants to show that it purchased with notice of their equity, or that it did not pay value for the property. McAlpine v.**

Burnett, 23 Tex. 650; Lewis v. Cole, 60 Tex. 341; Turner v. Cochran, 61 S. W. 923, 94 Tex. 480." (101 S. W. 560.)

It therefore matters not whether the suit is brought by the legal title holder or the equitable title holder, under Texas law the burden in all events is on the equitable title holder to overcome the presumptions attended with the purchase of the legal title.

Applicability of Erie Railroad Co. v. Tompkins, and Central Vermont Ry. Co. v. White, 238 U. S. 507.

In a Texas court petitioner would have been entitled to a judgment on the pleadings, inasmuch as defendants sought to reform their deed executed in 1899 on account of their mistake and did not plead petitioner was a mala fide purchaser; i. e., they failed to plead a defense to petitioner's cause of action. The necessity of a plea that the legal title holder is a mala fide purchaser, being made an essential part of the equitable title holder's cause of action or defense by the substantive law of Texas, it must be recognized and followed by Federal Courts.

Somewhat similar in principle to the Texas rule is the minority rule applied in some states that plaintiff must plead and prove freedom from contributory negligence, and this court has held the state court decisions create substantive rights, and therefore are not rules of procedure. It was said in *Central Vermont Railway Company v. White*, 238 U. S. 507:

"But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff. Washington & G. R. Co. v. Gladmon, 15 Wall 401(1), 407, 408, 21 L. Ed. 114-116; Hough v. Texas & P. R. Co., 100 U. S. 225, 25 L. Ed. 617; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551 (4) 557, 35 L. Ed. 270, 272, 11 Sup. Ct. Rep. 653; Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner), 147 U. S. 581, 37 L. Ed. 288, 13 Sup. Ct. Rep. 557; Hemingway v. Illinois C. R. Co., 52 C. C. A. 477, 114 Fed. 843." (238 U. S. p. 512.)

The principles enunciated by the Supreme Court in its language quoted in the preceding paragraph have

been approved by the court in the following case: *New Orleans & Northeastern R. Co. v. Harris*, 247 U. S. 367, at page 372; *Hill v. Smith*, 260 U. S. 592, at page 594; *Herron v. Southern Pac. R. Co.*, 283 U. S. 91, at page 93; and *Miller v. Union Pac. R. Co.*, 290 U. S. 227.

The fact that this Court under the doctrine of *Swift v. Tyson*, 16 Pet. 1, which dealt with substantive law, has uniformly held that the law governing the burden of proof in cases involving contributory negligence lay in the field of general law in which the Federal Courts were not bound by state law, seems to establish the view of this Court against the holding of the Honorable Circuit Court of Appeals that the Texas decisions do not create substantive law but are only matters of practice or procedure.

Therefore, since the Texas decisions announced the substantive law of the state, they should have been followed by the trial court and the Circuit Court of Appeals. (*Erie Railway Company v. Tompkins*, supra, and *Ruhlin v. New York Life Ins. Co.*, supra.)

The Circuit Court intimated that a holding that the Texas rule was a matter of substantive law would conflict with the "New Rules of Federal Practice" (promulgated subsequently to trial of case at bar). We do not believe the rules of Federal practice were intended to destroy substantive rights attended with the purchase of legal title to real property for, if they were so interpreted, they would be "unauthorized and void" because the enabling act

under which the rules were promulgated forbade interference with "the substanve rights of any litigant." (Act June 19, 1934, sec. 1, 28 *U. S. C. A.*, sec. 723b.) We believe Professor Cook, in his article *"Substance and Procedure in Conflict of Laws"* (1933, 42 *Yale Law Journal* 333) came to the correct conclusion in stating that in order to prevent a plaintiff from choosing the state he will bring his action with a view to benefits by so-called "procedural" advantages not accorded by the *lex loci*, rules of presumption, burden of proof and analogous rules which may materially affect the outcome of litigation, should be treated as substantive. The underlying policy of the *Erie* case may be thwarted as easily in cases in which failure to apply a state rule of presumption attended with the purchase of legal title seems likely to lead to a result different from those which would be obtained by an application of the rules, as by failure to apply those state rules which are traditionally called substantive.

Strictly speaking the rules of evidence are considered matters of practice and procedure, but where rules of evidence go to the substantive rights of the parties, such as the admissibility of testimony in cases involving title to land, the Federal Courts follow the state decisions. *Olcott v. Bynum*, 17 Wall 44; *Turner v. California Co.* (5 C. C. A. Tex.), 54 F. (2d) 552; *O'Donnell v. U. S.* (9 C. C. A. Cal.), 91 F. (2d) 14, 22; reversed other grounds 303 U. S. 501.

The Honorable Circuit Court laid great emphasis

on the fact that the presumptions attended with the purchase of a legal title were not created by state statutes but by decisions of the Supreme Court, and said:

> "We have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply what is the proper practice in courts of equity. The practice followed in the state courts of Texas, where equity courts as such do not exist, is not controlling."

This court said in *Erie Railroad Co. v. Tompkins*, supra:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of a state shall be declared by its Legislature in a statute or by its highest court in a decision, is not a matter of Federal concern." (304 U. S. 78.)

Again in *Ruhlin v. New York Life Insurance Co.*, supra, the court said:

> "The subject is bound to be governed, even in the absence of state statutes, by the decisions of the appropriate state courts. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity." (304 U. S. 205.)
>
> "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the

state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state court, and just as they would in a case tried in a state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law." (304 U. S. 209.)

THIRD POINT

The court erred in holding there was no showing of consideration paid for the oil and gas lease, for it is well settled in Texas that an instrument reciting $1.00 paid with obligations expressed or implied to drill offset wells, sufficiently shows on its face a consideration. Such is not only the rule in Texas but it is the majority rule and the one applied by the Federal Courts.

The partition deed to J. F. Rogers recited a consideration of $50.00 in hand paid (R. 105), while the lease in question recites a consideration of $10.00 paid, the royalties provided therein and also contained an unequivocal agreement to offset a well or wells producing oil or gas in paying quantities within 150 feet or in draining the leased premises (R. 139, 142). The assignment of the oil and gas lease from W. P. Chandler to petitioner's predecessor recites a consideration of $1.00 paid and other good and valuable considerations.

Jones v. Bevier, 59 S. W. (2d) 945 (writ denied), and *Bailey v. Shell Petroleum Corporation*, 95 S. W. (2d) 982 (writ denied), hold that a recitation of $1.00 paid and the obligation to drill offset wells was, under Texas decisions, a sufficient showing of consideration.

The recitation of $10.00 paid in the Chandler lease (R. 139) was sufficient evidence of payment of a valuable consideration to support the lease and the defense of innocent purchaser, such being the express holding in the Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelly v. Jackson*, 6 Pet. 622, 632); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350; *Robertson v. Hefley*, 118 S. W. 1159; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, as well as by the cases of *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, and *Jones v. Bevier*, 59 S. W. (2d) 945, above cited, in both of which writs of error were denied.

It is also settled in Texas that $1.00 paid is sufficient consideration for an oil and gas lease. This is held in the following cases: *Emde v. Johnson*, 214 S. W. 575, writ denied; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil & Refining Co.*, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982,

writ denied. These cases are founded on the Supreme Court case of *Quebe v. Gulf, C. & S. F. R. R. Co.*, 98 Tex. 6, 81, S. W. 20, 66 L. R. A. 734, I Ann. Case. 545, where the Supreme Court of Texas held that a recital of $1.00 paid was sufficient consideration for the release of damages for personal injuries. Indeed, this is the rule obtaining generally (18 *C. J.*, p. 166, sec. 47) except in Louisiana (*George v. Manhattan Land & Fruit Co.* (5 C. C. A.), 51 F. (2d) 28), and numerous cases could be cited to support such rule. See, also, *Corsicana Petroleum Co. v. Owens*, 110 Tex. 568, 222 S. W. 154, where a recited consideration of $28.20 was held sufficient to support a lease, which provided that the lease might be surrendered by the payment of $5.00 and all other amounts due at the time of the surrender, the court adverting to the fact that the consideration was satisfactory to the grantors themselves and there could be no reason for the court striking down that part of it.

It is also the rule, supported both by Federal and State authorities, that the written receipt of the consideration is at least prima facie evidence of the payment thereof, and sufficient to require the person attacking the deed or other instrument to prove otherwise; in other words, such acknowledgment is sufficient to discharge the burden of proof in the absence of countervailing testimony. *New York Life Ins. Co. v. Seifris* (C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtis* (App. D. C.), 259 F. 987; *DeArnaud v. U. S.*, 151 U. S. 483; *Russell v. Beckert*, 195

S. W. 607; *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied; *Luna v. Johnston*, 11 S. W. (2d) 350; *Haze v. Home Friendly Ins. Co.* (Md.), 197 A. 632; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. 92 F. 100; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360 and note. In the last case it was said:

> "* * * In the lease before us we find a valuable consideration paid, as it recites the payment of one dollar down. * * * Look back at hundreds of deeds through hundreds of years and you will find them stating one dollar as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds. The parties have chosen to treat it as a sufficient consideration; they have contracted that it shall be such; and no court, in the absence of fraud, can nullify their contract." (Ann. Cas. 1912B, p. 361.)

In *New York Life Ins. Co. v. Seifris* (3 C. C. A. Pa.), 46 F. (2d) 391, the court said:

> "* * * Something more is required when a party takes the stand to contradict what he has previously, and deliberately, said under his own hand or, as here, under its own seal. A receipt is a writen acknowledgment of payment and therefore evidence of payment. Moreover, it is evidence of a high order because it is the creditor's admission against interest that the debtor has paid his debt." (p. 392.)

In the Texas case of *Luna v. Johnston*, 11 S. W. (2d) 350, the rule is thus stated:

> "The deed which conveyed the property in question to appellee was executed five years after he and his wife were married, and recited a cash payment of $500. A recitation of payment in a deed is prima facie evidence that the amount named therein was actually paid, and the burden is upon the person attacking same to show a different consideration. Russell v. Beckert (Tex. Civ. App.), 195 S. W. 607; Robertson v. Hefley, 55 Tex. Civ. App. 368, 118 S. W. 1159; Whitlock v. Barham & Duncan, 172 Ark. 198, 288 S. W. 4." (p. 351.)

In *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, appellee sued in trespass to try title to recover certain property in the town of San Saba and the city sought by cross action to recover damages on the general warranty of title contained in its deed. The sole question was whether or not there was in fact any consideration for the deed, and the court said:

> "The recited consideration of $2,000 in the deed is sufficient in law, and the burden was upon appellants, particularly the interveners who were liable on their warranty of title to the city of San Saba, to show that there was in fact no consideration for the deed." (p. 1313.)

The rule is thus stated in *Corpus Juris* (66 *C. J.*, p. 1129, sec. 964):

> "But purchasers from a grantee are entitled to accept as true express recitals of the deed to

their grantor as to the consideration." (66 *C. J.* 1129.)

We think under *Erie Railroad Co. v. Tompkins*, supra, and *Central Vermont Railway Co. v. White*, supra, the court should have followed the Texas rule established by decisions of the Supreme Court of the state.

FOURTH POINT

The Honorable Circuit Court of Appeals erred in affirming a judgment which in effect granted a reformation of a deed executed in 1899, recorded in 1900, and an oil and gas lease executed and recorded more than four years prior to the filing of the suit, by eliminating from the description of the property conveyed the call for the Wiley Davis Northeast corner, which would have included the land in controversy, the pleadings and evidence wholly failing to excuse or explain the delay, such relief being accorded to the holder of the equitable title or an equitable right as against the holder of the legal title, for the reason that the asserted cause of action was barred by the statutes of limitation of Texas and equitable laches.

The partition deed to J. F. Rogers was dated February 28, 1899, and recorded February 10, 1900 (R. 205). The oil and gas lease to W. P. Chandler was dated October 20, 1930, and recorded November 18, 1930. The original petition was filed December 18,

1934 (R. 13), and the answer and cross action of defendants alleging a mistake in the call for the Wiley Davis Northeast corner (R. 34) was filed January 27, 1936 (R. 43).

The court found that the call for the Wiley Davis Northeast corner in the partition deed to J. F. Rogers was inserted by mistake (R. 68 ¶ 16).

Under *Swann v. Mills*, supra, and *Garrison v. Crowell*, supra, it is very plain that the legal title to the property involved in this suit vested in J. F. Rogers and through him in petitioner. Such deed must necessarily have been given that effect unless reformed, and the judgment below, in decreeing to defendants the tract of land in controversy, had the effect of reforming the deed. The Rogers heirs were charged with notice of the mistake they had made by virtue of the record of their deed. (*J. R. Watkins Co. v. Gibbs*, 66 S. W. (2d) 355; *Central National Bank v. Barclay*, 254 S. W. 140; *Vodrie v. Tynan*, 57 S. W. 680; *Martinez v. Guiterrez's Heirs*, 172 S. W. 766, writ den.; *Calhoun v. Burton*, 64 Tex. 510; *Boren v. Boren*, 85 S. W. 48, writ den.; *Ryman v. Petruka*, 166 S. W. 711; *Lant v. Manley*, 71 F. 7; *Teall v. Schroder*, 158 U. S. 172.)

Defendant's cause of action was barred by the statutes of limitation of Texas because it was not brought within four years after the alleged cause of action accrued (Article 5529, 16 *Vern. Rev. Civ. Stat.* 1925).

The doctrine of laches, if nothing else, would bar such right. (*Connelly v. Hammond*, 51 Tex. 635;

Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co. (5 C. C. A.), 279 Fed. 977.)

CONCLUSION

Many witnesses who lived in the neighborhood of the Rogers family testified they had never heard of the three Rogers brothers claiming to own an interest in a strip along the West side of the tract partitioned to J. F. Rogers (R. 224, 275, 190).

The field notes in the handwriting of surveyor J. H. Simmons to Tract No. 1 partitioned to W. H. Rogers and Tract No. 3 partitioned to J. W. and F. E. Rogers were introduced in evidence (R. 264-274), photostatic copies being contained in the record (R. 269-274). They actually represent the work done on the ground by Mr. Simmons, and show that he ran through the center of the East one-half, going from East to West all the way to the Bozeman land, his footsteps being reflected by the call "thence West 440 yards to corner 4 to Bozeman land, pine 65° W 6 L. and pine S. 80° E. 14 L." (R. bottom page 266, top page 267, Exhibit 46; photostat original field notes R. 271). B. M. Bozeman formerly owned the West one-half of the Thomason Survey (R. 294), his East line being conterminous with the Rogers West line. Mr. Simmons had previously surveyed the Bozeman land in making their partition and knew the location of the East line of the West one-half of the Thomason survey owned by Mr. Bozeman (R. 192-193). His field notes pre-

pared while making the Rogers partition conclusively show that he ran a line through the center of the Rogers land to the Bozeman land. He therefore had to go 66 feet West of the gear shaft to reach the Bozeman land. Defendants did not deny the fact that the Bozeman line was 66 feet West of the gear shaft. Refuting F. E. Rogers' testimony is the salient fact the field notes are silent about the survey stopping 66 feet short of the Bozeman land (which lay South of the Wiley Davis land in a continuation of the Davis' East line).

We called this to the attention of the Honorable Circuit Court of Appeals as shown that the field notes in the handwriting of the surveyor contradicted the testimony of F. E. Rogers which was in substance that the surveyor stopped 66 feet short of the Wiley Davis Northeast corner and set a stake and then went South and set another stake subsequently replaced by the gear shaft. However the court stated that since petitioner had not been able to find and introduce the field notes of the tract partitioned to J. F. Rogers, there was nothing in the field notes introduced contradicting Mr. Rogers' testimony. The only way (which was the best way) petitioner had of contradicting Rogers' testimony was through the statements made in the field notes because he was the only person living who accompanied the surveyor at the time of the survey.

The instruments filed of record in the county where

the land was situated called for the Wiley Davis Northeast corner and there was nothing on record to place petitioner on notice that the surveyor set stakes short of the adjoinder since they were not mentioned in any instrument in its chain of title. The physical facts did not charge petitioner with notice defendants were claiming the strip because they were not in possession, but the public was, inasmuch as the strip was being used for a road. It has been the established public policy of Texas to require transfers of land by written instruments, for the state has experienced the uncertainties and confusions in land titles resting in parol. The case at bar is very illustrative of the injustices encountered in varying written instruments by parol testimony, for Mr. Rogers' testimony as received and applied by the court not only contradicted the material calls in the deeds in petitioner's chain of title, but conflicted with the field notes in the handwriting of the surveyor showing he went to the Bozeman land.

Texas courts, in order that its citizens can rely on recorded written evidence of title, have made a rule of law that there is a presumption attended with the purchase of a legal title of innocence, good faith and value paid. While not foreclosing the right of a holder of the equitable title to assert his claims, the courts have placed upon him the burden of overcoming the presumptions following the legal title. It is only fair and reasonable that the equitable title holder assume these burdens if the courts of the state are to carry out

the established policy that land titles are not to rest in parol.

The Texas rule therefore is not limited to the reception of evidence and matters concerning the trial of a case but it goes to the fundamentals of a cause of action or defense.

A substantive right having been created by the Texas courts for the protection of the legal title holder, such right should have been recognized in the Federal Court if *Erie Railroad Company v. Tompkins* is to have the effect intended by this Honorable Court, for otherwise an equitable title holder might prevail in a Federal Court while he would not be able to do so in a state court.

The Honorable Circuit Court failed to follow the Texas decisions in construing the partition deed when it held that after rejecting the call for the Wiley Davis Northeast corner, title to the strip did not pass to J. F. Rogers and petitioner because all of the 66 feet was not being used for a road, and no mention was made in such deed of a road. The court has placed a limitation on the Texas decisions that does not exist, this state having always held that title to a road passes unless it is expressly reserved in the deed, it being immaterial that the road was not being used or was not mentioned in the conveyance.

WHEREFORE, it is respectfully prayed that upon hearing of this cause, the judgment below be reversed and judgment rendered for petitioner for the land involved, together with such other relief to which it may be entitled.

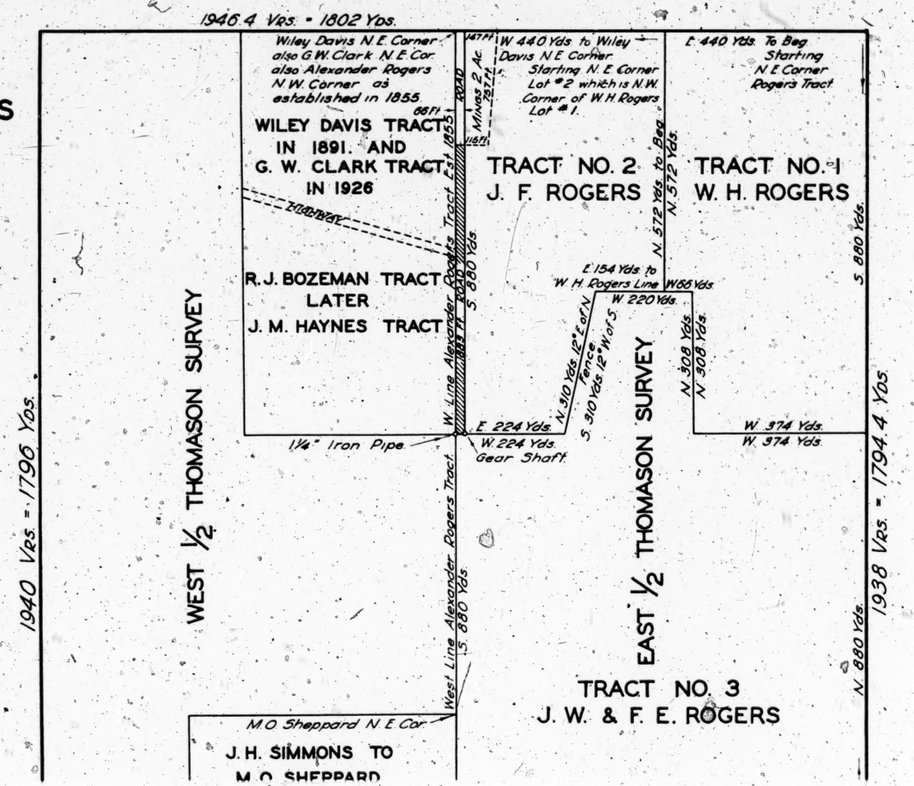
DAVID B. TRAMMELL,
Fort Worth, Texas,

CLAYTON L. ORN,
Fort Worth, Texas,
Attorneys for Petitioner.

A. M. EBRIGHT,
HAYES McCOY,
Bartlesville, Okla.,
H. J. PATTERSON, Austin, Texas,
PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN, Fort Worth, Texas,
Of Counsel.

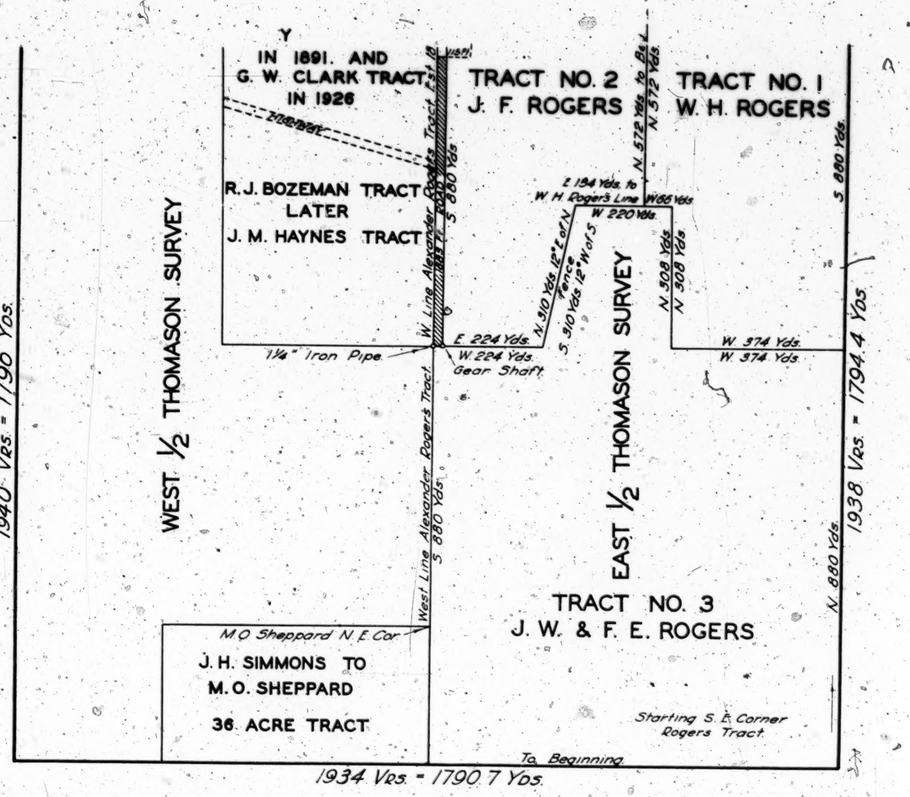
MAP DRAWN FROM TRIAL COURTS' FINDINGS OF FACT AND CONCLUSIONS OF LAW.

SCALE 1 IN.= 200 YDS.


1946.4 Vrs. = 1802 Yds.
1940 Vrs. = 1796 Yds.
1938 Vrs. = 1794.4 Yds
N. 880 Yds.
S. 880 Yds.
W. Line Alexander Rogers Tract
WEST ½ THOMASON SURVEY
EAST ½ THOMASON SURVEY
Wiley Davis N.E. Corner also G.W. Clark N.E. Cor. also Alexander Rogers N.W. Corner as established in 1855
66 Ft. Road
147 Ft.
Mineral Z Ac.
WILEY DAVIS TRACT IN 1891. AND G. W. CLARK TRACT IN 1926
Highway
R.J. BOZEMAN TRACT LATER J. M. HAYNES TRACT
W 440 Yds to Wiley Davis N.E. Corner. Starting N.E. Corner Lot #2 which is N.W. Corner of W.H. Rogers Lot #1.
E 440 Yds To Beg Starting N.E. Corner Rogers Tract
TRACT NO. 2 J. F. ROGERS
TRACT NO. 1 W. H. ROGERS
N. 572 Yds. to Beg.
E 154 Yds. to W.H. Rogers Line W 66 Yds
W 220 Yds.
N. 310 Yds 12" E of N Fence
S. 310 Yds 12" W of S
N. 308 Yds
W. 374 Yds.
E. 224 Yds.
W. 224 Yds. Gear Shaft
1¼" Iron Pipe
TRACT NO. 3 J. W. & F. E. ROGERS
M.O. Sheppard N.E. Cor.
J. H. SIMMONS TO M. O. SHEPPARD

OF FACT AND CONCLUSIONS OF LAW.

SCALE 1 IN.= 200 YDS.


1940 Vrs. = 1796 Yds.
1938 Vrs. = 1794.4 Yds
1934 Vrs. = 1790.7 Yds.
N. 880 Yds.
S. 880 Yds.
W. Line Alexander Rogers Tract
WEST ½ THOMASON SURVEY
EAST ½ THOMASON SURVEY
IN 1891. AND G. W. CLARK TRACT IN 1926
Highway
R.J. BOZEMAN TRACT LATER J. M. HAYNES TRACT
TRACT NO. 2 J. F. ROGERS
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S. 310 Yds 12" W of S
N. 308 Yds
W. 374 Yds.
E. 224 Yds.
W. 224 Yds. Gear Shaft
1¼" Iron Pipe
TRACT NO. 3 J. W. & F. E. ROGERS
M.O. Sheppard N.E. Cor.
J. H. SIMMONS TO M.O. SHEPPARD 36. ACRE TRACT
Starting S.E. Corner Rogers Tract
To Beginning